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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

COMMENTS OF NET COMPETE NOW

Net Compete Now hereby submits its comments in the above-captioned proceeding.

INTRODUCTION

Net Compete Now is an organization representing Internet users and providers, small businesses, think tanks, and consumers, as well as education, community and opinion leaders. What unites all these entities is a shared belief in the tremendous promise of the Internet – and a shared conviction that regulation of the Internet is sure to stifle that promise and limit the benefits and competitive choices that consumers would otherwise enjoy.

These are not simply matters of faith. There is already ample evidence that the marketplace is fostering rapid growth, innovation and competition in the provision of Internet facilities, technology, services and content. And there is also more than enough accumulated wisdom – among economists, regulators and antitrust authorities – to confirm that efforts to regulate the Internet with measures that have traditionally been applied to common carriers and "essential facilities" are much more likely to thwart than to promote such continued growth, innovation and competition.

Other commenting parties will no doubt address the complex legal issues raised in the Notice of Inquiry. Net Compete Now is concerned with issues of public policy. It simply cannot serve the public interest to encumber the development of the Internet with layers of regulation at a time when investment and innovation are so crucial. Nobody could have predicted, only a few years ago, the incredible array of Internet services that the marketplace has made available to the public today. And nobody knows today what the Internet will be providing a few years from now. These are precisely the circumstances in which regulatory intervention is likely to do the least good and the most harm.

Regulation is likely to add to the risks of investment and innovation while reducing the potential rewards – a sure-fire formula for putting the brakes on Internet growth. Moreover, regulation will replace the marketplace in guiding the course of whatever Internet investment and innovation does occur – a result that will deprive consumers of the array of services that best meets their needs and demands. If ever there were a time for betting on the marketplace and against regulation, the time is now.

I. THE MARKETPLACE IS WORKING TO PROMOTE BROADBAND INVESTMENT, INNOVATION AND COMPETITION.

Today's Internet marketplace has produced an abundance of competition and choice for consumers, with a promise of more to come. There is competition and choice among Internet facilities, among Internet service providers, and among what already seems like an infinite number of services and content that can be accessed *on* the Internet. For most consumers, it's the latter that may seem most important. Since virtually all Internet service providers offer complete access to the Internet, what matters most to consumers is the vast array of websites, chatrooms, user groups, and services that are available on the Internet.

But while the facilities and technology for *accessing* the Internet are largely transparent to consumers, they are hardly unrelated to the services available *over* the Internet. This is because technological advances and innovation in the facilities used to access the Internet enable greater innovation and diversity in the content and services that can be provided over the Internet. Thus, the deployment and use of broadband facilities for the provision of high-speed Internet access has greatly expanded the range of services that can be provided over the Internet. For example, high-speed Internet access has fostered the delivery over the Internet of music, video, graphics-intensive interactive content, and telephone-like voice communications services. As technology develops and as facilities are deployed and upgraded, still more new types of Internet services will be developed and made available to Internet users.

So far, the marketplace has worked to stimulate rapid and continual innovation and deployment of advanced Internet technology and services. As the Commission has recently determined, "deployment of advanced telecommunications capability is proceeding in a reasonable and timely fashion. Specifically, competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy."[1] Although a substantial majority of Internet users still rely on dial-up narrowband Internet access, the option of high-speed broadband Internet service is available to – and is being chosen by – more and more consumers every day. Thus, according to the Commission,

[1] *Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, rel. Aug. 21, 2000, p. 6.

> as of December 31, 1999, there were approximately 1.8 million residential subscribers of high-speed services. We further estimate that approximately 1.0 million of these users subscribed to services that meet our definition of advanced telecommunications services. This is a three-fold increase in residential advanced services (again, full two-way services) from the previous year.[2]

Even if high-speed Internet access facilities and services were only being deployed at this rapid pace by a single provider in each community, the availability of this new competitive alternative would be enormously beneficial to consumers. It would provide them with all the benefits of high-speed access to the Internet and would provide a basis for the development of new services to be offered over the Internet, on a competitive basis, by the hundreds of thousands of websites that are available to anyone with access to the Internet. Fostering the continued deployment and availability of high-speed Internet access to more and more communities throughout the nation would, in these circumstances, surely deserve a higher priority than seeking to ensure a choice of high-speed Internet access providers in those communities where high-speed access was already available.

Indeed, fostering such continued deployment and availability deserves the *highest* priority in order to ensure that the benefits of the Internet are not unevenly distributed between those who live in urban and rural areas, or between the wealthy and the poor. If there are marketplace incentives for broadband facilities providers to continue to rapidly deploy such facilities in order to reach rural and less affluent communities, it seems obvious that local, state and federal governments should avoid intruding in a way that suppresses those marketplace incentives.

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[2] *Id.*

But there is, in any event, no need to choose between extending Internet access to all segments of the nation's consumers and fostering competitive choice among providers of access to the Internet. The marketplace appears to be fulfilling *both* of these goals. The marketplace is providing consumers with competing facilities-based providers of high-speed Internet access (in addition to ubiquitously available narrowband dial-up access). *And* it is impelling these providers to make their service available to communities of all types – urban and rural, rich and poor.

Cable television operators have led the way in upgrading their existing broadband facilities in order to make high-speed Internet service available to their subscribers. But once cable began making high-speed Internet access a reality, other competing providers of video and telecommunications services accelerated their efforts to follow suit. Thus, as the Commission has noted,

> [c]able providers, LECs, and utilities show every sign of continuing their deployment of advanced telecommunications infrastructure for residential customers. Additionally, there is a real prospect, in the next several years, of significant deployment of advanced telecommunications capability by wireless technologies, both terrestrial and satellite-based.[3]

The numbers bear this out. Cable modem deployment reportedly will reach 3.6 million by the end of this year, up dramatically from the end of 1999. Likewise, DSL is being aggressively deployed by the LECs and is projected to serve over 2 million customers by year-end. Satellite is already offering high-speed service via DirecPC (which uses a telephone line for upstream traffic and serves over 100,000 customers) and the newly launched StarBand (which provides satellite-delivered high-speed two way

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[3] *Id.* at ¶ 217.

service). Fixed wireless systems, offering high-speed access, have already begun operation in numerous communities, and there are other companies that are poised to use terrestrial broadcast as a method of high-speed access in the near future. As various technologies deploy service, consumers will face an ever-growing array of high-speed Internet options.

Moreover, in competing to provide Internet access as part of their "full-service" voice, video and data offerings to customers, these companies are not limiting their build-out plans to wealthy or densely populated areas and already serving rural and less affluent areas as well:

> In the past year the number of residential customers buying advanced services has tripled to approximately 1.0 million subscribers. These subscribers appear to be surprisingly spread out around the country. Advanced telecommunications capability is available now and continues to be deployed to a significant number of residential customers in communities of all types – affluent and low income, inner city, suburb, small town and thinly populated countryside.[4]

And, *if marketplace forces continue to govern*, there is every reason to expect these competitive developments to continue in a manner that inoculates the nation against the danger of a digital divide:

> By all major indicators, both residential subscribers and investment in facilities to serve them will continue to increase. Investment of billions of dollars in deploying [advanced telecommunications capabilities] to residential customers will continue. Rivalry among providers will increase. New technologies will continue to become available. Consumer demand will continue to grow.[5]

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4 *Id.*

5 *Id.*, ¶ 218.

These projections should put the issue of access to broadband facilities by competing "Internet service providers" in perspective. On the one hand, if there is "rivalry" among facilities-based providers to offer subscribers high-speed Internet access, and if virtually all providers of high-speed access enable subscribers to reach virtually all Internet content and services, it is not apparent that compelling those facilities-based providers to open their facilities to multiple ISPs would produce any further competitive benefits for consumers – even if such a requirement had no countervailing negative effects. On the other hand, if there were any such benefits to consumers, the intense competition among facilities-based providers to win and retain subscribers would compel them to offer access to multiple ISPs – provided that such access did not degrade the quality of service for all subscribers.

II. FORCING FACILITIES-BASED PROVIDERS OF HIGH-SPEED INTERNET SERVICE TO PROVIDE ACCESS TO ISPs WILL INHIBIT INVESTMENT, INNOVATION AND COMPETITION.

The marketplace, as shown above, is working to promote the rapid deployment of a multiplicity of competitive facilities-based providers of high-speed Internet service, all of which offer subscribers access to the full array of content and services available on the Internet. To the extent that the availability of multiple ISPs on a single facility meets the needs and demands of consumers, the marketplace is likely to ensure that such multiple ISPs are available. Conversely, however, substituting an "open access" requirement for marketplace forces is only likely to impair the ability of facilities-based providers to meet most efficiently the Internet needs and demands of consumers. Such a requirement would provide an artificial subsidy to those ISPs that might not otherwise have access to a particular facilities-based provider's subscribers. But it would do nothing to enhance – and would, in fact, diminish – the welfare of consumers.

Economists, regulators, courts and antitrust authorities have generally recognized the inherent downsides to imposing common carrier or "open access" regulation on owners of resources or facilities that might be useful to others. As Justice Breyer has pointed out, one of the most harmful effects – especially in the context of an evolving technology that requires substantial continuing investment and innovation – is that

> a sharing requirement may diminish the original owner's incentive to keep up or improve the property by depriving the owner of the fruits of value-creating investment, research, or labor . . . . *Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement.*[6]

In the case of Internet facilities, the problem is not simply that a sharing requirement might reduce any competitive advantage that might accrue from the deployment of such facilities. In addition, a sharing requirement might introduce technological difficulties that would impair the quality and reduce the value of high-speed Internet service for *all* users of the facilities. The prospect of such difficulties would *further* deter investment and innovation – and this, in turn, would slow the pace at which high-speed Internet service is made available across the nation. From the standpoint of Net Compete Now and the entities that it represents, that would be disastrous.

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[6] *AT&T v. Iowa Utilities Board,* 119 S.Ct. 721, 753-54 (1999) (Breyer, J., concurring and dissenting) (emphasis added).

It is rare enough that administrative agencies or antitrust courts impose a common-carrier-like duty to deal even on entrenched monopolists who might be deemed to own "essential facilities."[7] But it would be as unprecedented as it would be unwarranted to impose such a duty on an *emerging* facilities-based competitor in a marketplace in which there is every prospect of facilities-based competition – and in which no competitor even threatens to possess, much less currently possesses, monopoly power. Treating emerging facilities-based competitors as if they were entrenched monopolists would simply stall or stifle their emergence. It would, in the case of providers of high-speed Internet facilities, slow down the nationwide deployment of such facilities and, for a large number of consumers, ensure that their only Internet option remains dial-up narrowband service.

CONCLUSION

The marketplace is working to foster the rapid deployment of high-speed Internet service throughout the nation. It was not regulation but marketplace competition that motivated and enabled cable operators to make massive investments to upgrade and rebuild their facilities in order to offer consumers a high-speed Internet alternative. And it was not regulation but marketplace competition that motivated and enabled telephone companies, DBS and others to follow suit and deploy competitive high-speed services.

Forcing these facilities-based providers to make their facilities available on a regulated basis to resellers of Internet access would deter and distort the marketplace deployment of competitive high-speed facilities, as well as the development of Internet-

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7 The lower courts that have adopted an antitrust "essential facilities" doctrine have limited it to very narrow circumstances. *See, e.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). And, as Justice Breyer recently pointed out, the Supreme Court "has never adopted" the doctrine. *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 753 (Breyer, J., concurring and dissenting).

based services that rely on high-speed delivery to consumers. It would not promote investment; it would deter it. It would not foster innovation; it would stifle it. And, instead of promoting rapid deployment and availability of high-speed facilities to all segments of the population, it would put the brakes on deployment and threaten to create a "digital divide."

This cannot possibly be in the public interest. The Commission has been on exactly the right track in allowing the marketplace – and not regulation – to govern the deployment of Internet facilities and the development of Internet services. That is the approach that best promotes such deployment on a competitive basis and that best serves the needs and interests of consumers.

Respectfully submitted,

Julia L. Johnson

Chair, Net Compete Now
P.O. Box 143
1718 M Street, N.W.
Washington, D.C. 20077-5782

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CERTIFICATE OF SERVICE

I, Elizabth Eddlemon, do hereby certify that I caused one copy of the foregoing Comment of Net Compete Now to be served by hand to all parties listed below, on this 1st day of December, 2000.

Johanna Mikes
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C163
Washington, D.C. 20554

Carl Kandutsch
Cable Services Bureau
445 12th Street, S.W.
Room 3-A832
Washington, D.C. 20554

Robert Cannon
Office of Plans & Policy
445 12th Street, S.W.
Room 7-B410
Washington, D.C. 20554

Christopher Libertelli
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C264
Washington, D.C. 20554

Douglas Sicker
Office of Engineering & Technology
445 12th Street, S.W.
Room 7-A325
Washington, D.C. 20554

International Transcription Service, Inc.
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Elizabeth Eddlemon